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Supreme Court of the United States

October Term, 1975

No. 75-925

PAUL A. WOOD and WOODMONT APARTMENT CORPORATION OF CANTON,

Petitioners,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

BRIEF OF RESPONDENT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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I. INTRODUCTORY STATEMENT

Respondent The Equitable Life Assurance Society of the United States ("Equitable") submits the within Brief in Opposition to the Petition for Writ of Certiorari (the "Petition") to the United States Court of Appeals for the Sixth Circuit submitted by Petitioners Paul A. Wood ("Wood") and Woodmont Apartment Corporation of Canton ("Woodmont"). As more fully set forth below, none of the considerations favoring review on certiorari, as set forth in Rule 19 of the Supreme Court Rules, exists in the instant case, nor does the Petition present any other special or compelling reason for such review.

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The Petition purports to present six (6) separate questions for review. However, the questions presented include several self-evident propositions of law, to wit, Questions A, E and F.

The remaining three (3) questions presented essentially contend that the United States District Court for the Northern District of Ohio, Eastern Division (the "District Court"), and the Sixth Circuit Court of Appeals (the "Court of Appeals") improperly applied the doctrine of *res judicata* to the circumstances at bar.

Petitioners suggest in Section IV of their submission that the case involves provisions of the United States Constitution and the Constitution of the State of Ohio which do not bear even the remotest connection to the case at bar.

In view of the Petitioners' treatment of all questions presented in a single discussion and in further view of Respondent's dissatisfaction with the Statement of the Case set forth in the Petition, Respondent has adopted the approach of presenting its own Statement of the Case followed by an Argument directed at the two holdings of the District Court, as affirmed by the Court of Appeals, all as more fully set forth below.

II. STATEMENT OF THE CASE

A. Nature of the Action and Proceedings in the Courts Below

The proceedings in the District Court embraced two separate but related lawsuits: (1) Federal Civil Action No. C69-831, instituted in 1969 by Wood and Woodmont against Equitable; and (2) Federal Civil Action No. C70-1139, instituted in 1970 by Woodmont against Equitable, originally in the Court of Common Pleas for Stark County, Ohio (State Civil Action No. 115,176) and there-

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after removed upon the petition of Equitable to the District Court, where the lawsuit was assigned Civil Action No. C70-1139.

In the "Amended Claim" filed by Wood and Woodmont in Civil Action No. C69-831, the plaintiffs alleged in essence as follows: (i) that Equitable on the one hand and Wood and Woodmont on the other had entered into a Building and Loan Agreement pursuant to which Equitable had agreed to finance the construction by Wood and Woodmont of an exclusive high-rise apartment development; (ii) that Equitable had breached its obligations under the Building and Loan Agreement by failing and refusing to disburse certain funds; (iii) that after refusing to comply with the Building and Loan Agreement, Equitable instituted a foreclosure action in Stark County Common Pleas Court and that thereafter all interested parties entered into a written agreement of settlement, resolving all their differences; (iv) that according to this settlement agreement, Woodmont agreed not to contest the foreclosure action and Equitable thereupon obtained its foreclosure judgment; and (v) that Equitable never observed its obligations under the settlement agreement and therefore obtained its foreclosure judgment by virtue of fraud upon Woodmont.

Equitable's Answer to the Amended Claim in Civil Action No. C69-831 raised the affirmative defense of *res judicata*, based on the Stark County foreclosure action.

In the "Claim" filed in Federal Action C70-1139, Woodmont alleged the same causes of action described above. Equitable's Answer to this Claim also raised the affirmative defense of *res judicata*.

In May of 1973, pursuant to the Motion of Equitable, The Honorable Thomas D. Lambros, United States District Judge, ordered a consolidation of Civil Action Nos. C69-831 and C70-1139.

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In January of 1974, Equitable filed a Motion for Summary Judgment in the consolidated actions, *inter alia* upon the ground that the causes of action alleged in both Federal actions were barred by the doctrine of *res judicata*.

On September 26, 1974, The Honorable Frank J. Battisti filed the District Court's Memorandum Opinion and Order (set forth in the Petition at 1a-4a), granting Equitable's Motion. Judge Battisti found that the causes of action alleged in the two consolidated cases were identical, namely one for breach of the Building and Loan Agreement and a second for breach of the alleged settlement agreement. The District Court held not only that the doctrine of *res judicata* applied as a bar to the pending actions, but also that, "As to the cause of action relating to the breach of an alleged settlement agreement, the uncontroverted and unchallenged exhibits submitted by [Equitable] clearly show that no settlement agreement was ever entered into between the parties." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a).

Wood and Woodmont appealed to the Sixth Circuit Court of Appeals. By Order dated October 3, 1975, the Court of Appeals, noting that the appeal appeared to be subject to summary dismissal pursuant to Rules 3(e) and 8 of the Rules of the United States Court of Appeals for the Sixth Circuit, unanimously dismissed the appeal. The Court of Appeals, referring specifically to Chief Judge Battisti's District Court Opinion, stated that, ". . . the issues in the underlying litigation are clearly controlled by the doctrines of res judicata and collateral estoppel." (Order of the Court of Appeals, set forth in the Petition at 2b). Thereafter, Wood and Woodmont filed a "Motion for Reconsideration" which the Clerk of the Court of Appeals, by correspondence dated November 5, 1975, refused to accept for filing since it was untimely tendered.

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B. Statement of the Facts

1. *The Woodmont Apartment Development*

Prior to March of 1965, Wood formed Woodmont to acquire title to certain real property located at 1732 Market Avenue North in Canton, Ohio. Wood was at all relevant times the President and sole owner of all capital stock of Woodmont.

After acquisition of title to the real estate, Woodmont arranged financing with Equitable for the construction of an exclusive high-rise apartment development. On March 4, 1965, the following documents were executed between Woodmont and Equitable: (1) A Building and Loan Agreement; (2) A Promissory Note in the amount of One Million Nine Hundred Thousand Dollars ($1,900,000) executed by Woodmont in favor of Equitable (the "Promissory Note"); and (3) A Mortgage Deed executed by Woodmont as Mortgagor.

In the months which followed, Equitable disbursed to Woodmont in two installments a total of Two Hundred and Thirty-Five Thousand Dollars ($235,000). No further sums were disbursed by Equitable, however, due to certain breaches by Woodmont of the terms and conditions of the Building and Loan Agreement. Thereafter, construction work on the Canton property remained idle up to and including the date on which Equitable instituted foreclosure proceedings against Woodmont.

2. *The Stark County Foreclosure Action*

On June 29, 1967, Equitable filed a "Petition for Money Judgment, Foreclosure and Other Equitable Relief" in Stark County, Ohio Common Pleas Court (Case No. 111,249, referred to herein as "the Stark County foreclosure action") against Woodmont, et al. The Petition filed

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by Equitable alleged that Woodmont had committed various breaches of the Building and Loan Agreement, was in default on the Promissory Note, and that there was due and owing thereunder the sum of Two Hundred and Thirty-five Thousand Dollars ($235,000). Equitable prayed, *inter alia*, for a money judgment in that amount and for foreclosure on the Mortgage.

In its Answer, Woodmont averred that Equitable had breached the terms of the Building and Loan Agreement to Woodmont's detriment and loss.

During the pendency of the Stark County foreclosure action, counsel for Wood and Woodmont and counsel for Equitable exchanged correspondence dated July 21, July 25, and August 5, 1969, in an effort to resolve the differences between the parties; however, no accord was ever reached.

The foreclosure action came on for hearing before The Honorable William R. Quinn on July 28, 1969, and by Journal Entry dated the same day, the Court found that:

> (i) Woodmont owed Equitable under the Promissory Note the sum of Two Hundred and Thirty-five Thousand Dollars ($235,000); and
>
> (ii) Woodmont breached its obligations under the Mortgage and the Building and Loan Agreement and that by reason thereof the Mortgage had been breached and had become absolute.

On September 17, 1969, Woodmont filed a Petition to Vacate the Judgment and also an amended Answer and Cross Petition. The Petition to Vacate Judgment alleged in relevant part as follows:

> (i) That the same cause of action involving the same parties and the same claims was already pending in Federal Court in Cleveland;

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(ii) That Equitable breached its Building and Loan Agreement with Woodmont;

(iii) That while the Stark County foreclosure action and the Federal Court proceeding were pending, Equitable and Woodmont entered into a settlement agreement pursuant to which Woodmont consented not to contest the Stark County foreclosure action, and that Equitable thereby obtained its foreclosure judgment by a fraud perpetrated upon Woodmont and upon the Court.

Woodmont prayed for an order vacating the foreclosure judgment, for a temporary injunction suspending the Order of Sale of the premises and for leave to file its Amended Answer and Cross Petition. The Amended Answer and Cross Petition merely alleged in essence that Equitable had breached the Building and Loan Agreement and that the same cause of action was pending in Federal Court in Cleveland.

Woodmont's Petition to Vacate was heard on September 25, 1969 in Stark County Common Pleas Court. In accordance with the Journal Entry of September 29, 1969, the Court decreed that the Petition to Vacate, the request for a temporary injunction suspending the Order of Sale and the request for leave to file the Amended Answer and Cross Petition were all overruled.

Woodmont appealed from this order to the Court of Appeals for the Fifth District, Stark County, Ohio. The Court of Appeals, in a Memorandum Opinion dated October 9, 1970, unanimously affirmed the Common Pleas Court in the following language:

"Coming now to the order appealed from, we have made careful examination of the Bill of Exceptions and find no error prejudicial to the appellant. Fraud was pleaded but not proven, although opportunity was afforded." (Memorandum Decision of the

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Stark County, Ohio Court of Appeals, attached as Exhibit 10 to the Affidavit of Jules L. Markowitz submitted in support of the Motion for Summary Judgment in the District Court).

III. ARGUMENT

A. The District Court and Court of Appeals Correctly Applied the Doctrines of *Res Judicata* and Collateral Estoppel to the Claims at Bar.

A comparison of the causes of actions set forth in Federal Civil Action Nos. C69-831 and C70-1139 with the proceedings in the Stark County foreclosure action clearly establishes that all causes of action and claims for relief in the Federal actions are barred by the doctrine of *res judicata.*

The prerequisites to the application of the doctrine of *res judicata* are: (1) that there has been a prior adjudication by a court of competent jurisdiction; (2) that the prior adjudication has become final; (3) that the prior adjudication has been on the merits; (4) that the prior adjudication involved the same parties *or persons in privity therewith;* (5) that the prior adjudication involved the same subject matter or cause of action. See, *e.g., Schroeder v. 171.14 Acres of Land,* 318 F. 2d 311 (8th Cir. 1963), and authorities cited therein.

Upon review, it is clear that the Stark County foreclosure action satisfies all of the above prerequisites vis-a-vis the within Federal actions, and thus that the Courts below were correct in holding that the Stark County lawsuit poses an absolute bar to the prosecution of the claims set forth in Civil Action Nos. C69-831 and C70-1139.

First of all, there can be no question that the Stark County Common Pleas Court (and, accordingly, the Court of Appeals for the Fifth District, Stark County, Ohio) were courts of jurisdiction competent to adjudicate the causes of

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action and claims for relief pending before them. The doctrine of *res judicata* applies regardless of whether the prior adjudication is rendered by the same court in which the subsequent action is pending or by a court of independent or concurrent jurisdiction. See, *e.g.*, *Schroeder v. 171.14 Acres of Land*, cited *supra*.

Secondly and thirdly, it is beyond question that the judgment in the Stark County foreclosure action was both final and on the merits. As to finality, it is the law of *res judicata* that the prior judgment has obtained the requisite finality after expiration of the appeal time without an appeal having been taken, or after the judgment has been affirmed on appeal, or after an appeal which has been taken is dismissed. *Epstein v. Chatham Park, Inc.*, 52 Del. 56, 153 A. 2d 180 (1959). In the Stark County foreclosure action, an appeal from the Common Pleas Court's refusal to vacate its judgment or suspend the order of sale was taken to Fifth District Court of Appeals, Stark County, Ohio, which unanimously affirmed the Common Pleas Court. As to the third prerequisite, the two Journal Entries in the Stark County Common Pleas Court (attached as Exhibits 6 and 9 to the Affidavit of Jules L. Markowitz in support of the Motion for Summary Judgment in the District Court) and the Memorandum Decision of the Stark County Court of Appeals (Exhibit 10 to such Affidavit) leave no doubt that the prior adjudication was "on the merits".

Fourthly, the persons or parties between whom the prior judgment is to operate as *res judicata* must be the same as the parties involved in that prior adjudication *or persons in privity therewith*. The pleadings in the relevant lawsuits disclose that: (1) Woodmont, the only Plaintiff in Civil Action No. C70-1139 and one of the two Plaintiffs in Civil Action No. C69-831, was a party to the Stark County foreclosure action; and (2) Equitable, the only

Defendant in both Federal actions, was also a party to the Stark County foreclosure action.

Although Paul A. Wood individually, a Plaintiff in Federal Civil Action No. C69-831, was not a formal named litigant in the Stark County foreclosure action, he clearly was in privity with Woodmont, a defendant to that action. The uncontroverted evidence adduced in the District Court in support of Equitable's Motion for Summary Judgment clearly shows that Wood's relationship with Woodmont was at all relevant times that of President and sole shareholder and assignee of any and all choses in action Woodmont had against Equitable. In his capacity as sole stockholder in Woodmont, Wood is considered a person "in privity with" a party to the prior adjudication, since a judgment against a corporation is binding and conclusive in a subsequent action by or against its stockholders, even though the stockholders are not served or joined in the prior action in their individual capacities. See, *e.g.*, *Marin v. Augedahl*, 247 U.S. 142 (1918). In all matters within the ambit of their corporate powers, the officers of a corporation represent their shareholders and, accordingly, in the eyes of the law, the shareholder is privy to adjudications involving the corporation. See, *e.g.*, *Estate of Egan v. Commissioner of Internal Revenue*, 260 F. 2d 779 (8th Cir. 1958), and cases cited therein.

In his capacity as assignee from Woodmont of its choses in action against Equitable, Wood would similarly be concluded by the Stark County foreclosure action, for the prior adjudication not only binds named parties but also those persons who subsequently acquire an interest in the adjudicated subject matter, whether by inheritance, succession, purchase or assignment. See *e.g.*, *Lamb v. Cramer*, 285 U.S. 217 (1932).

Finally, the fact that Wood contracted to be a personal guarantor of Woodmont's obligations to Equitable

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under the Building and Loan Agreement does not clothe him with an immunity from the Stark County foreclosure judgment. Regardless of what capacity Wood purports to be suing in and what relationship Wood bears to Woodmont, Wood would nevertheless be concluded by the Stark County foreclosure action since, for purposes of the defense of *res judicata*, the binding effect of the prior judgment extends not only to persons who are *in form* named parties but also to persons who, *by virtue of their direct interest in the subject matter previously adjudicated and their ability to control the prior proceedings*, defend, examine witnesses and appeal from a judgment rendered therein, are *in substance* identifiable with a named litigant. *Bernhard v. Bank of America National Trust & Savings Association*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). Again, the uncontroverted evidence in the District Court established that Paul A. Wood enjoyed such a "controlling person" status in the Stark County foreclosure action.

As to the fifth prerequisite for the application of *res judicata*, a comparison of the Federal causes of action with the Stark County foreclosure action reveals that all Federal causes of action have been previously adjudicated. In this regard, the District Court, after an examination of the two Federal actions, concluded that, "The causes of action sought to be litigated [in C70-1139] are *identical* to those alleged in C69-831." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a) (emphasis added). In both Federal actions (C69-831 and C70-1139), one cause of action is based upon the allegation that Equitable committed breaches of the Building and Loan Agreement with Woodmont. This exact cause of action was clearly set forth as a defense in the Answer filed by Woodmont in the Stark County foreclosure action.

The law of *res judicata* provides that a subsequent independent action for affirmative relief is barred by a prior adjudication in which the subject matter forming the

underlying basis for the claim was interposed as a defense. See, *e.g.*, *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E. 2d 317 (1944). This rule applies where, as in the Stark County foreclosure action, the subject matter which was framed as a defense could also have been asserted as a counterclaim for affirmative relief. *Leslie v. Mollica*, 236 Mich. 610, 211 N.W. 267 (1926). In this regard, the District Court expressly found that the issue of Equitable's alleged breach of the Building and Loan Agreement was clearly litigated in the Stark County foreclosure action:

> "The Stark County foreclosure action is *res judicata* on the issue of Equitable's alleged breach which is raised in C69-831 and C70-1139. See *Norwood v. McDonald*, 142 Ohio St. 299 (1943). In the prior state proceeding, it was determined that Woodmont breached the building and loan agreement, thus Equitable had no duty to continue to make the monetary disbursals under the contract. The prior action resolves the contention concerning Equitable's alleged breach." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a).

B. The Courts Below Correctly Found That As a Matter of Law, No Settlement Agreement Had Ever Been Reached.

The only evidence introduced before the District Court with respect to Wood and Woodmont's claim in both Federal Actions that Equitable had breached the terms of an alleged settlement consisted of three (3) letters exchanged between counsel for Wood and Woodmont and counsel for Equitable. (Exhibits B, C, and D to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court).

That correspondence clearly establishes as a matter of law and without any dispute of fact that no settlement accord was ever reached. The first letter from Equitable dated July 21, 1969 (Exhibit B to the Supplemental Affi-

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davit of Jules L. Markowitz, set forth in the Petition at 2c-7c) constituted a *proposed* settlement accord. Although Wood and Woodmont executed a copy of this July 21 letter under the designation "Agreed to and Accepted," their execution was expressly conditioned upon certain proposed changes contained in their July 25, 1969 correspondence (Exhibit C to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court):

> ". . . Thus, it is my understanding that your intentions as set forth in your letter of July 21, 1969 should also include the following which I shall deem part of the conditions of that letter." [several conditions thereinafter set forth]
>
> . . .
>
> "I have obtained the approval and signatures of both Wood and the Builders to both *your letter and this letter which shall be construed together* as an acceptance and approval. Please advise that your understanding is the same as set forth herein." (emphasis added).

In its letter of August 5, 1969 (Exhibit D to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court), *Equitable unequivocally rejected this counter-offer*:

> "This is to advise that Equitable is unwilling to agree to the changes in the terms of settlement or to the additional provisions as set forth in your letter of July 25, 1969.
>
> "Therefore, you are hereby notified, as provided in the last paragraph of our said letter of July 21, 1969, that the Equitable hereby cancels any further obligations on its part under the terms thereof, and declares said letter to be of no further force or effect."

As succinctly stated by the District Court, "[T]he uncontroverted and unchallenged exhibits submitted by [Equitable] clearly show that no settlement agreement was

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ever entered into between the parties." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a).

Moreover, the claim that Equitable obtained its foreclosure judgment pursuant to the breach of an alleged settlement agreement has *itself* been subject to prior adjudication. In its Petition to Vacate Judgment filed in the Stark County foreclosure action, Woodmont alleged this exact cause of action:

> "*FOURTH CAUSE OF ACTION*
>
> Plaintiff incorporates the previous Causes of Action and further states that while this Case and the Case in Federal Court were pending, Defendant repeatedly promised to fulfill its agreement and to furnish the balance of money required to complete construction. During this period, Defendant did prepare a written agreement which stipulated that one of the conditions to furnishing the money was a contract in which Plaintiff consented not to contest the lawsuit in this Court; and the Plaintiff did sign the agreement and in good faith did not contest the Case at hand in this Court. Plaintiff now sets forth that the Defendant deliberately lured Plaintiff by false promises and obtained its judgment by fraud upon the Plaintiff and upon this Court." (Exhibit 7 to the Affidavit of Jules L. Markowitz submitted in the District Court).

After a hearing, the Stark County Common Pleas Court overruled the Petition to Vacate and Woodmont appealed to the Court of Appeals for Stark County, Ohio. In its Memorandum Opinion, the Stark County Court of Appeals alludes to the Common Pleas Court's rejection and denial of this cause of action:

> "At the conclusion of the hearing the trial court stated in the record:
>
> 'COURT: *** In other words, if there was . . . this agreement *** in effect or anything similar

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> to this it would be completely contrary to the entry providing for the foreclosure because that certainly contemplates a public sale in the event the judgments aren't satisfied, so there is no evidence of fraud and the Court sees no reason to grant any order enjoining the completion of the sale proceedings which has already been set up. So you may prepare an entry denying the petition to vacate.'" (Exhibit 10 to the Affidavit of Jules L. Markowitz submitted in the District Court).

As evidenced by the passage quoted by the Court of Appeals from the record of the hearing before the Common Pleas Court, the trial court expressly found "no evidence of fraud" – no evidence that Equitable breached an alleged settlement agreement and thus obtained its foreclosure judgment through fraud.

In reliance upon the very letter which Wood and Woodmont utilized in the District Court and which is included in the Petition as "Appendix C", Woodmont repeatedly asserted before the Stark County Court of Appeals that that July 21, 1969 letter constituted a settlement agreement which Equitable breached and pursuant to which it fraudulently obtained its foreclosure judgment.

Equitable maintained before the Stark County Court of Appeals (i) that the execution of this July 21, 1969 letter by Woodmont (and Wood) was accompanied by and conditioned upon a second letter from Wood and Woodmont, dated July 25, 1969, *which attempted to incorporate changes and additional provisions into the July 21, 1969 proposal;* (ii) that the execution of the July 21, 1969 letter by Wood and Woodmont, taken in conjunction with their July 25, 1969 letter, constituted a counter-proposal and not a binding agreement; and (iii) that, by letter dated August 5, 1969, Equitable clearly rejected this counter-proposal.

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After consideration of the evidence and the written and oral arguments of counsel, the Stark County Court of Appeals affirmed the Common Pleas Court's overruling of the Petition to Vacate, and expressly found that as to the cause of action for breach of the alleged settlement agreement, the proof simply failed:

> "Coming now to the order appealed from, we have made careful examination of the Bill of Exceptions and find no error prejudicial to the Appellant. *Fraud was pleaded but not proven, although opportunity was afforded.*" (Exhibit 10 to the Affidavit of Jules L. Markowitz submitted in the District Court) (emphasis added).

In brief, in addition to the fact that the causes of action for breach of the alleged settlement agreement fail as a matter of law, such claims for relief in the District Court were barred by the doctrines of *res judicata* and collateral estoppel.

CONCLUSION

Since Petitioners have failed to present any special or compelling reasons for review of the Court of Appeals decision, the request for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel, a member of the bar of the United States Supreme Court, hereby certifies that, in compliance with Rule 33 of the Supreme Court Rules, three (3) printed copies of the foregoing Brief of Respondent The Equitable Life Assurance Society of The United States in Opposition to the Petition for Writ of Certiorari were deposited in the United States mail on this 24th day of February, 1976, with first class postage prepaid, addressed to Joseph Sheban, Esquire, 5020 Sheban Drive, Youngstown, Ohio 44511, counsel of record for the Petitioners.

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